Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1138

RON PATTERSON - - - - - Petitioner

— V. —

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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TABLE OF CONTENTS

	Page
OPINION BELOW	1 & 2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2 & 3
STATEMENT OF THE CASE	3-7
HOW THE FEDERAL QUESTION WAS RAISED	5
REASONS FOR GRANTING CERTIORARI	5 & 6
Kentucky Revised Statute Chapter 514, Section 040 is arbitrary and irrational in violation of the due process clause of the 14th Amendment, and the State Court decided a federal question in a manner not in accord with applicable decisions.	
CONCLUSION	7 & 8
APPENDIX	9-22
JUDGMENT OF THE JESSAMINE CIRCUIT COURT	9 & 10
OPINION OF THE COURT OF APPEALS OF KENTUCKY	11-17
ORDER DENYING DISCRETIONARY REVIEW BY THE SUPREME COURT OF KENTUCKY	19
MANDATE OF THE COURT OF APPEALS OF KENTUCKY	21
"QUESTIONS OF LAW" Excerpted From Petitioner's Brief Before the Court of Appeals of Kentucky	22
"QUESTIONS OF LAW" Excerpted From Petitioner's Motion For Discretionary Review Before the Supreme Court of Kentucky	22

AUTHORITIES CITED

Page

Cases:

U. S. v. Gainey, 380 U.S. 63 6
Leary v. U.S., 395 U.S. 6 6
Barnes v. U.S., 412 U.S. 837 6

Constitutional Provisions:

United States Constitution, Fourteenth Amendment 2

Statutes:

28 U. S. C. section 1257 (3) 2
Kentucky Revised Statutes 514.040 .....2 & 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

RON PATTERSON - - - - - Petitioner

— V. —

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Supreme Court of Kentucky which, by Order Denying Discretionary Review, dated November 14, 1977, affirmed the opinion of The Court of Appeals of Kentucky, on which mandate was issued on November 18, 1977.

OPINION BELOW

No opinion was rendered by the Supreme Court of Kentucky. The order of the Supreme Court of Kentucky, denying a review of the decision of the Court of Appeals, is set forth in the Appendix, *infra*, at p. 15. The opinion of the Court of Appeals of Kentucky is set forth in the Appendix, *infra*, at pp. 10-14. The mandate of the Court of Appeals of Kentucky is set forth

in the Appendix, *infra*, at p. 16. The judgment of conviction entered in the Circuit Court, Jessamine County, Kentucky is set forth in the Appendix, *infra*, at pp. 8 & 9.

JURISDICTION

The judgment of the Supreme Court of Kentucky, denying a review and affirming the petitioner's conviction, was entered on November 14, 1977. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257(3).

QUESTION PRESENTED

Whether Kentucky Revised Statute 514.040 is arbitrary and irrational and a violation of the due process requirements of the 14th Amendment to the United States Constitution when it statutorily presumes criminal "intent" by proof that an issuer of a check returned for insufficient funds did not make the check good within ten (10) days after he learned the check had been dishonored.

STATUTE INVOLVED

Kentucky Revised Statutes, Chapter 514, Section 040 provide in pertinent part as follows:

KRS514.040 Theft by deception

(1) A person is guilty of theft by deception when he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

* * *

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not

be honored by the drawee.

* * *

(4) For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:

* * *

(b) Payment was refused by the drawee for lack of funds, upon presentation within (30) days after issue, and the issuer failed to make good within ten days after receiving notice of that refusal.

STATEMENT OF THE CASE

On July 9, 1976, the petitioner was convicted following a jury trial for theft by deception in violation of Kentucky Revised Statutes Chapter 514, Section 040. He was sentenced to one (1) year in the penitentiary. A timely appeal was taken to the Court of Appeals of Kentucky, and the conviction was affirmed. A timely Motion for Discretionary Review was filed before the Supreme Court of Kentucky, and the conviction was again affirmed.

The facts upon which the conviction was based are as follows:

On October 9, 1975, the defendant wrote a check to John Rankin for $2,955.04 to pay for some leather goods. (T. p. 4).[1] The check was returned for insufficient funds on October 17, 1975. (T. p. 4). It was uncontradicted that the reason for the insufficient funds was that checks from the defendant's clients, too, were returned for insufficient funds, (T. p. 9) and

[1] "T" refers to the transcript of the trial in the Circuit Court of Pulaski County.

because a client, Patch Work Shops, stopped payment on a check which had been deposited, creating insufficient funds in the defendant's account, to pay for the check to John Rankin (T. p. 42).

Other goods were ordered by the defendant on a charge account with John Rankin.

The defendant sent payments to John Rankin totalling, to the penny, the amount of the "cold check", but the funds were applied to the charge account. (T. p. 13).

The check was not made good within ten (10) days after the defendant knew that it had been dishonored.

There is conflicting evidence as to whether the $2,955.04 repaid was to cover the $2,955.04 check. John Rankin said he got no instructions with the payments, so he applied them to the charge account. (T. p. 17 and p. 19).

Yet, there was a check for a $1,000.00 payment written on October 24, 1975, and there was a handwritten note of the same date, as follows:

> "October 24, 1975, Dear John, I just got back in town and found that the bank account is in bad shape. We had a lot of bad checks come back on us from our customers. We will send the rest of what we owe you in a few days. I am very sorry, Ron. Rankin Exhibit No. 2. (T. p. 8).

There was also a money order for a $400 payment dated November 5, 1975. It, too, was applied to the charge account, because there were no instructions to John Rankin. However, a handwritten note bore the same date — November 5, 1975. Here is how John Rankin described that note (T. p. 9).

QUESTION BY COMMONWEALTH ATTORNEY:

> Q. 76 Do you have any other correspondence in which Patterson acknowledged the cold check:

ANSWER BY JOHN RANKIN:

> A. Yes sir. On November 5th, I got another note that was on Unique Christian Ministers, P. O. Box 231. It says, "November 5th, John, will bring up the rest of the money when I come up on the 10th for the rest of the order. Rankin Exhibit No. 3.

How the Federal Question was Raised

The question tendered herein was raised by motion at the close of the evidence by the prosecution (T. p. 35) motion after evidence, and on appeal to the Court of Appeals of Kentucky, and on appeal to the Supreme Court of Kentucky.

Reasons for Granting Certiorari

Some of the logical presumptions raised by the return of a check because of insufficient funds, and the failure to make the check good within ten (10) days, are as follows:

> (1) The issuer made a mathematical error on his balance when he wrote the check.
> (2) A joint account partner or spouse withdrew the funds without notifying the issuer.
> (3) The bank transferred the funds from the issuer's account to pay a debt owed the bank, thereby reducing the issuer's balance.
> (4) The Internal Revenue Service levied on the account depleting the funds.
> (5) Checks from others were deposited and credited to the issuer's account, but were later returned because of "insufficient funds."
> (6) Checks deposited to issuer's account were subject to "stop payment" orders.

(7) The bank credited a deposit to the wrong account.

(8) Others, including the writing of a check on an account with insufficient funds to defraud a payee. (The statutory presumption.)

To satisfy the due process clause of the 14th Amendment to the United States Constitution, the statute must meet and satisfy this Court's requirements:

First, there must be a rational connection between the fact proved and the ultimate fact presumed, *U. S. vs. Gainey*, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

It is submitted that all of the eight presumptions above listed rationally connect with the fact proved; namely, that payment was refused for insufficient funds, and the check was not made good within ten (10) days.

Second, it must be said with "substantial assurance" that the fact presumed is "more likely than not to flow from the proved fact." *Leary vs. U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 23L. Ed. 2d 57 (1969) — otherwise, it is "irrational" or "arbitrary."

With so many presumptions having a rational connection with the proven fact, how can any *one* presumption, exclusive of the others, be the one to flow "more likely than not" from the proven fact? Common sense tells us that it is impossible to choose one and exclude all others without being arbitrary.

Third, the evidence necessary to invoke the presumption must be sufficient for a rational juror to find the presumed fact, "beyond a reasonable doubt." This Court has stated that this is the most "stringent test." *Barnes vs. U. S.*, 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed.

2d 380 (1973).

Ron Patterson, the petitioner, explained his insufficient funds to be the result of "stop payment orders" and "insufficient funds" on check he had deposited, thereby depleting the funds in his account. Granted, the jury is not required to believe this uncontradicted testimony. But if they do not so believe, then how are they to conclude, with certainty beyond a reasonable doubt, which other of the presumptions flows more likely than not from the proven fact. To choose one presumption, over all of the others, to the exclusion of a reasonable doubt is a Quixotic exercise, at best.

In this era of mendacity, this is a special and important question of first impression. We should require the statute to meet the very real requirements of the due process clause of the 14th Amendment to the Constitution of the United States, or we should boldly announce that we are of the considered opinion that the problem of cold checks in our business community is more important than individual rights under the due process clause, and that a debtor's prison will be created for all who do not, or can not, within ten (10) days make good any check returned for insufficient funds. But certainly, we should not state that a statute which arbitrarily picks only one of many rational presumptions, as here, meets that most stringent test. The decisions below violate the 14th Amendment, and were decided by the State Courts in a way not in accord with applicable decisions of this Court, and not theretofore decided by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari

should be granted to review the judgment of the Court of Appeals of Kentucky which was affirmed by a denial of petitioners Motion for Discretionary Review before the Supreme Court of Kentucky.

Respectfully submitted,

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Attorneys for Petitioner

JESSAMINE CIRCUIT COURT

NICHOLASVILLE, KENTUCKY, JULY 2, 1976

COMMONWEALTH OF KENTUCKY, Plaintiff

V. JUDGMENT

RONALD PATTERSON, Defendant

OPEN COURT
TIME _____ ENTERED
O.B. 9A PAGE 388
ATTN: V. Burton, C.J.C.C.
By M. Miller, D.C.

This 2nd day of July, 1976, the defendant Ronald Patterson appeared in open court with his attorney, did not appear, and Harlan Veal appeared as attorney for the Commonwealth, the court informed the defendant that he has been found guilty of the crime of theft by deception by (a jury) on his plea of (not) guilty, the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the court:

ADJUDGED that the defendant is guilty of the crime of theft by deception and his punishment is fixed at confinement under the custody of the Bureau of Corrections for a period of one year; and it is FURTHER ORDERED AND ADJUDGED that this sen-

tence of one year (sic) shall run (concurrently with) (consecutive to and begin at the expiration of) the sentence of ——— years imposed on the defendant under indictment No. ———— of the ———————— Circuit Court; and it is FURTHER ORDERED AND ADJUDGED that the County Sheriff shall deliver the defendant to the custody of the Bureau of Corrections hereunder at such location within this state as the Bureau shall designate.

ADJUDGED that pursuant to KRS 532.120 it is ordered that the defendant shall receive jail credit time of 6 days on the within sentence imposed.

After fixing sentence, the court informed the defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free counsel and free transcript if he could not afford Same. Pending appeal (defendant's bail is fixed at $2,000.00) (defendant is to be held without bail).

/s/ HENRY C. COX,
Circuit Judge
Jessamine Circuit Court

APPENDIX

OPINION RENDERED: July 8, 1977
TO BE PUBLISHED

Court of Appeals of Kentucky

FILE NO. CA-405-MR

RON PATTERSON - - - - - Appellant

APPEAL FROM JESSAMINE CIRCUIT COURT
V. HONORABLE HENRY C. COX, JUDGE
NO. 76C-6

COMMONWEALTH OF KENTUCKY - Appellee

AFFIRMING

BEFORE: HAYES, HOWARD AND WINTERSHEIMER, JUDGES.

HAYES, JUDGE. This is an appeal wherein the appellant, Patterson, attacks the constitutionality of the "cold check" statute, KRS 514.040.

Ron Patterson, a thirty-six (36) year old Baptist minister, had a part-time job selling handcrafted leather goods to retail outlets. While selling his leather wares, Patterson became acquainted with one John Rankin of Rankin & Grider, Inc., importers and exporters of leather products with offices in Nicholasville, Kentucky. Patterson sold Rankin some watch bands and Rankin told Patterson he could sell him

some leather ponchos at a low price. As a result, Patterson on October 9, 1975, ordered from Rankin a large quantity of ponchos. The sale amounted to $2,955.04 for which Patterson gave his check, No. 113. At this time, Rankin and Patterson discussed Rankin ordering some $10,000.00 worth of leather goods for Patterson at a substantial discount to Patterson. Check No. 113 was deposited by Rankin in his bank on October 10, 1975, and on October 17th the check was returned by the drawee bank, First and Farmers National Bank of Somerset, Kentucky, with a slip explaining that there were insufficient funds in the account of the drawer, Patterson, to cover the check. On the same date Rankin told Patterson that "the check had come back insufficient funds and he told me to run it back through again". On October 18th Rankin ran the check through the bank again. The check "bounced" again for insufficient funds. The check was returned to Rankin on October 24th. From this point the testimony is in conflict on whether the $1,000.00 money order received by Rankin from Patterson on October 28th and an additional $400.00 money order received by Rankin from Patterson on November 6, 1975, were in part payment for check No. 113 or on open account for the later ordered goods in the amount of $7,000.00. In any case, Rankin, after discussing the "cold check" No. 113 with Patterson some eighteen (18) times, filed suit in Jessamine Circuit Court. An arrest order was issued and Patterson was indicted for violation of KRS 514.040. Upon trial by a jury, appellant was found guilty and sentenced to one (1) year in the penitentiary.

The applicable Kentucky Penal Code provision is found in KRS 514.040, which is as follows:

(1) A person is guilty of theft by deception when

he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

* * *

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

* * *

(4) For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:

* * *

(b) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the issuer failed to make good within ten (10) days after receiving notice of that refusal.

The net result of the "cold check" statute is that the knowledge required by subsection (e) is imputed to the issuer of the check if he does not make the check good within ten (10) days after he learns the check has been dishonored. This imputed knowledge in turn meets the requirements of subsection (1) concerning "intent to deprive".

Patterson contends that this rebuttable presumption is "irrational and arbitrary" and therefore unconstitutional as a violation of the 14th Amendment of the U. S. Constitution. This is a case of first impression in Kentucky.

In determining whether or not a criminal statute making one fact presumptive or prima facie evidence of another fact satisfies the due process requirements of the 14th Amendment to the U. S. Constitution, cer-

tain standards have been established by the U. S. Supreme Court:

(1) There must be a rational connection between the fact proved and the ultimate fact presumed, *U. S. v. Gainey*, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

(2) An inference is "irrational" or "arbitrary" and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary v. U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

(3) The evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. This is the most stringent test, *Barnes v. U. S.*, 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

Mr. Justice Powell, delivering the opinion of the court in *Barnes v. U. S., supra*, stated:

> To the extent that the "rational connection", "more likely than not" and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to difference of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard . . . as well as the more-likely-than-not standard, then it clearly accords with due process.

As noted in 35 *A. L. R.* 375, 43 *A. L. R.* 49 and 95 *A. L. R.* 486 most state statutes on worthless checks require the intent to defraud as an essential element.

These statutes commonly contain the "prima facie" presumption or inference provision of intent to defraud. Of couse these are rebuttable presumptions and conviction will not be had where the accused can satisfactorily explain otherwise. In other words, the statutes generally do not create conclusive presumptions which normally are held unconstitutional because such are within the sole province of the jury.

In interpreting a Kansas Statute very much like the Kentucky Statute, the court stated in *State v. Haremza*, 213 Kan. 201, 515 P. 2d 1217 (1973):

> One of the well-recognized presumptions of law is that a person intends all the natural and probable consequences of his voluntary acts. Where a person has written an insufficient funds check and receives property or other consideration therefore from the payee of the check, and further where the maker of the check has been notified that the check has not been paid and fails to make payment within seven days after such notice, we find that there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fraudulent intent or guilty knowledge . . . The notice provision gives to the drawer of the check a final opportunity in which to make the check good and is peculiarly for his benefit. In a worthless check case it is obviously the defendant who has the more convenient access to evidence relating to his intent and knowledge. These are matters within his own head and usually are not within the knowledge of the prosecutor.

The legislature of this Commonwealth created the "cold check" statute in such a manner that proof of one fact (failure to cover the check within ten (10) days after due notice) is prima facie evidence of another fact (criminal intent to deceive) essential to the

guilt of the accused. The verdict still must rest upon all the evidence which must establish his guilt beyond a reasonable doubt.

Since the inference satisfied the reasonable doubt standard, and the "more-likely-than-not" standard, we conclude as the U. S. Supreme Court did in ***Barnes,*** *supra* and the Kansas Supreme Court did in *Haremza,* *supra* that this satisfies the requirements of due process.

The appellant in his brief states that to uphold his conviction would be the same as imprisoning him for a debt which is a violation of the Kentucky Constitution. We believe that the worthless check statute does not punish one for a debt but rather for a fraudulent act. Since intent to defraud is an essential element, it is not in violation of Section 18 of the Kentucky Constitution prohibiting imprisonment for debt.

The appellant's contention that the evidence was insufficient as a matter of law to sustain a conviction is clearly refuted by the record since there was an abundance of evidence to convict. And in light of all the evidence, the fact that the trial court erred in admitting evidence that Rankin borrowed money in order to buy the leather ponchos and in turn sell them to Patterson, was not harmful or prejudicial beyond a reasonable doubt.

The judgment is affirmed.

All concur.

Attorneys for Appellants

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Attorney General

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PROOF OF SERVICE

I, Dale B. Mitchell, Attorney for the Petitioner, herein and a member of the bar of this court, hereby certify that on this —— day of February, 1978, three (3) copies of the Petition for Writ of Certiorari were mailed first class, postage prepaid, to Hon. Robert F. Stephens, Attorney General, Frankfort, Kentucky 40601 and Hon. Harlan Veal, Commonwealth's Attorney, Main Street, Nicholasville, Kentucky, Counsel for Respondent. I further certify that all parties required to be served have been served.

/s/ _____

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Supreme Court of Kentucky

SC-395-D

(CA-405-MR)

RON PATTERSON - - - - - Movant

V. JESSAMINE CIRCUIT COURT
No. 76C-6

COMMONWEALTH OF KENTUCKY - Respondent

ORDER DENYING DISCRETIONARY REVIEW

The motion of Ron Patterson for a renew of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED November 14, 1977.

/s/ JOHN S. PALMORE
Chief Justice

Commonwealth of Kentucky

COURT OF APPEALS
MANDATE

RON PATTERSON

FILE No. CA-405-MR **APPEAL FROM JESSAMINE**

VS. **OPINION RENDERED** July 8, 1977

Circuit Court Action No. 76C-6

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

It is further considered that the appellee recover of the appellant its cost herein expended.

NOVEMBER 14, 1977 — Movant's motion for Discretionary Review denied by the Supreme Court.

/s/ JOHN C. SCOTT, Clerk

A COPY ATTEST

(SEAL)

ISSUED November 18, 1977.

"QUESTIONS OF LAW"

Excerpted from Petitioner's Brief Before the Court of Appeals of Kentucky

1. Whether the presumed fact of "knowing . . . that the check . . . would not be paid", under KRS 514.040 (4), is an irrational and arbitrary, and hence unconstitutional statute, when the presumption flows from the proved facts that "payment was refused by the drawer for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal".

"QUESTIONS OF LAW"

Excerpted From Petitioner's Motion for Discretionary Review Before the Supreme Court of Kentucky

1. Whether the presumed fact of "knowing . . . that the check . . . would not be paid", under KRS 514.040 (4), is irrational and arbitrary, and hence an unconstitutional statutory presumption, when the presumption flows from the proved facts that "payment was refused by the drawer for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal".

Supreme Court, U. S.
FILED
MAR 23 1978
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1138

RON PATTERSON - - - - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

---

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Table of Authorities ii

Statement of Question Presented iii

Opinion Below 1

Jurisdiction 2– 3

Constitutional and Statutory Provisions Involved.... 3– 5

Kentucky Revised Statutes 514.040..... 3– 4

Constitution of the United States, Amendment XIV, Section 1 5

Counterstatement of the Case 5– 6

Argument—KRS 514.040(4)(b) Complies with the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States 6–11

Conclusion 12

Proof of Service 13

TABLE OF AUTHORITIES

Cases:

	PAGE
Barnes v. United States, 412 U. S. 837 (1973)	2, 8, 10
Berry v. State, 153 Ga. 169, 111 S. E. 669, 35 A.L.R. 370 (1922)	11
Flannigan v. State (Md.), 191 A. 2d 591 (1963)	11
Hardin v. Kentucky Utilities Company, 390 U. S. 1 (1968)	2
Leary v. United States, 395 U. S. 6 (1969)	9, 10
Rudolph v. United States, 370 U. S. 269 (1962)	2
State v. Callahan (Conn.), 183 A. 2d 861 (1962)	11
State v. Campbell (Idaho), 543 P. 2d 1171 (1975)	11
State v. Eggers (Neb.), 120 N. W. 2d 541 (1963)	11
State v. Haremza, 213 Kan. 201, 515 P. 2d 1217 (1973)	9, 10
State v. Powell, 220 Kan. 168, 551 P. 2d 902 (1976)	11
State v. Morris (Kan.), 372 P. 2d 282 (1962)	11
Stevens v. State (Fla.), 324 So. 2d 190 (1975)	11
Turner v. United States, 396 U. S. 398 (1970)	9
United States v. Gainey, 380 U. S. 63 (1965)	9
United States v. Oregon, 366 U. S. 643 (1961)	2
United States v. Romano, 382 U. S. 136 (1965)	9

Kentucky Statutes:

514.040	2, 3–4, 6, 6–7, 11

Federal Constitution:

Amendment XIV	5, 7, 8, 9

Other Citations:

Title 28 U.S.C. § 1257(3)	2
Torcia, Wharton's Criminal Evidence, Section 94 (13 ed. 1972), page 155	11

STATEMENT OF THE QUESTION PRESENTED

I. **Whether KRS 514.040(4)(b) Complies with the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?**

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1138

RON PATTERSON - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion Below from the Court of Appeals of Kentucky is styled Ron Patterson v. Commonwealth, 556 S. W. 2d 909 (1977). The Supreme Court of Kentucky declined on November 14, 1977, to exercise its judicial discretion to review the Opinion of the Court of Appeals of Kentucky. The Opinion and Order denying review are correctly set forth in the petitioner's Appendix at page 11 of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court has fulfilled the initial requirements of 28 U.S.C. § 1257(3). Respondent submits, nevertheless, that petitioner's application for writ of certiorari should be denied since the issues presented therein do not comply with the prerequisites of Rule 19.

In his petition, the petitioner raises the contention that the presumption of intent as set forth in KRS 514.040 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Petitioner further alleges that the presumption is irrational and arbitrary.

It should be noted that the petitioner's question has been resolved in this Court's decision of *Barnes* v. *United States,* 412 U. S. 837 (1973). The Court of Appeals of Kentucky specifically relied on the holding of *Barnes, supra,* in concluding that the statutory presumption did not violate the Due Process Clause.

As stated in Rule 19 of the Supreme Court Rules, the granting of a review on a petition for writ of certiorari is purely within the discretion of the court. Ordinarily a writ will be granted only where there are special and important reasons therefor. See *Hardin* v. *Kentucky Utilities Company,* 390 U. S. 1 (1968); *United States* v. *Oregon,* 366 U. S. 643 (1961); and *Rudolph* v. *United States,* 370 U .S. 269 (1962).

Since this issue has previously been resolved, the contention as presented in the petition is insufficient to invoke the discretionary jurisdiction of this Court under Rule 19.

In order to fully apprise this Court as to the nature of the issue involved, the respondent will reply to the argument of the petitioner as if the contention were properly before the Court. A review of this argument by the Court will demonstrate the validity of the respondent's contention that the granting of the application for writ of certiorari is not desirable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes 514.040.

"(1) A person is guilty of theft by deception when he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

"(a) Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; or

"(b) Prevents another from acquiring information which would affect his judgment of a transaction; or

"(c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

"(d) Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether

such impediment is or is not valid or is or is not a matter of official record; or

"(e) *Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.*

"(2) The term 'deceive' does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

"(3) Deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

"(4) *For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid, if:*

"(a) The issuer had no account with the drawee at the time the check or order was issued; or

"(b) *Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the issuer failed to make good within ten (10) days after receiving notice of that refusal.*

"(5) Theft by deception is a Class A misdemeanor unless the value of the property is $100 or more, in which case it is a Class D felony."

(Emphasis is supplied for purposes of pointing out to this Court the exact statutory provision involved within the context of the statute.)

CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

SECTION 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COUNTERSTATEMENT OF THE CASE

Ron Patterson, a thirty-six (36) year old Baptist minister, had a part-time job selling handcrafted leather goods to retail outlets. While selling his leather wares, Patterson became acquainted with one John Rankin of Rankin & Grider, Inc., importers and exporters of leather products with offices in Nicholasville, Kentucky. Patterson sold Rankin some watch bands and Rankin told Patterson he could sell him some leather ponchos at a low price. As a result, Patterson on October 9, 1975, ordered from Rankin a large quantity of ponchos. The sale amounted to $2,955.04 for which Patterson gave his check, No. 113. At this time, Rankin and Patterson discussed Rankin ordering some $10,000.00 worth of leather goods for Patterson at a substantial discount to Patterson. Check No. 113 was deposited by Rankin in his bank on October 10, 1975, and on October 17th the check was returned

by the drawee bank, First and Farmers National Bank of Somerset, Kentucky, with a slip explaining that there were insufficient funds in the account of the drawer, Patterson, to cover the check. On the same date Rankin told Patterson that "the check had come back insufficient funds and he told me to run it back through again." On October 18th Rankin ran the check through the bank again. The check "bounced" again for insufficient funds. The check was returned to Rankin on October 24th. From this point the testimony is in conflict on whether the $1,000.00 money order received by Rankin from Patterson on October 28th and an additional $400.00 money order received by Rankin from Patterson on November 6, 1975, were in part payment for check No. 113 or on open account for the later ordered goods in the amount of $7,000.00. In any case, Rankin, after discussing the "cold check" No. 113 with Patterson some eighteen (18) times, filed suit in Jessamine Circuit Court. An arrest order was issued and Patterson was indicted for violation of KRS 514.040. Upon trial by a jury, appellant was found guilty and sentenced to one (1) year in the penitentiary.

ARGUMENT

KRS 514.040(4)(b) Complies with the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

KRS 514.040(4)(b) provides:

> "(4) For purposes of subsection (1), an issuer of a check or similar sight order for payment of money is *presumed to know* that the check or order, other than a postdated check or order, would not be paid, if:
>
> . . .
>
> (b) Payment was refused by drawer for lack of funds, upon presentation within thirty (30) days after issue, and issuer failed to make good within ten (10) days after receiving notice of that refusal." (Emphasis added.)

Simply put, the statute allows an inference of knowledge that a check would not be paid if within ten days after refusal of payment by the drawee, sufficient funds are not placed into the drawer's account to cover the refused check. The issuer, of course, can remedy the problem by simply giving the payee the funds and destroying the refused check. This inference goes to knowledge of the issuer that the check would not be paid. Such knowledge constitutes the element of intent to deceive which is a criminal offense under KRS 514.040(1).

In effect, the presumption enables the Commonwealth to establish a prima facie case. This presumption is rebuttable, but until the presumption is rebutted, the Commonwealth has met its burden of proof.

Appellant has attacked this presumption as irrational, arbitrary and unconstitutional. Although it is not stated as such by the appellant, it can be safely assumed that the appellant considers KRS 514.040(4)(b) as being unconstitutional for violating the Fourteenth Amendment due process clause of the United States Constitution.

It must be noted at the onset that there are no reported Kentucky cases that have considered the constitutionality of this particular statutory presumption. Nor are there any United States Supreme Court cases that have considered this precise point. There are, however, a number of United States Supreme Court cases that have established a standard for determining whether a statutory presumption satisfies the due process requirements of the Fourteenth Amendment. *Barnes* v. *United States,* 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973) is perhaps the most definitive. In *Barnes,* the appellant had been convicted of receiving stolen goods. Part of the instructions given to the jury provided for an inference of guilt from the unexplained possession of stolen goods. In upholding the constitutionality of such a presumption the United States Supreme Court said:

> "[1] The teaching of the foregoing cases is not altogether clear. To the extent that the 'rational connection,' 'more likely than not,' and 'reasonable doubt' standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." *Barnes, supra* at page 843.

Accord *Turner* v. *United States,* 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970), *Leary* v. *United States,* 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), *United States* v. *Romano,* 382 U. S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965), *United States* v. *Gainey,* 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

An alternative standard was set forth in *Leary* v. *United States, supra.* In *Leary,* the United States Supreme Court said that a statute authorizing the inference of one fact from the proof of another must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof." A statutory presumption would be struck down according to this Court unless:

> "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary, supra* at page 36.

Appellant cites this standard as being the one that should be followed by this court. The Commonwealth has no quarrel with this contention. The *Barnes* standard, however, should also be adhered to by this Court.

The appellant's argument is directly refuted by *State* v. *Haremza,* 213 Kan. 201, 515 P. 2d 1217 (1973). *Haremza, supra,* is precisely on point with the case at bar. In *Haremza,* the appellee-defendant had successfully argued before the district court of Kansas that the Kansas Statute 21-3707(2) was void and unenforceable under the Fourteenth Amendment. As part of his argument, the appellee advanced the theory that the

presumption that flowed from the failure to make good a bad check within seven days after notice that the check had been refused was contrary to the reasonable doubt standard of the due process clause.

In reversing the district court and upholding the constitutionality of the presumption, Justice Prager of the Supreme Court of Kansas said:

> "The general rule universally applied throughout the United States is that a statutory presumption will be upheld as constitutional if in accordance with experience of mankind, there is a natural and rational evidentiary relation between the fact proven and the one presumed." *Haremza, supra* at page 1221.

In applying the standard as set forth in *Leary, supra,* and *Barnes, supra,* concluded:

> "We have no hesitancy in holding in this case that the statutory presumption created by 21-3707 (2) does not constitute a denial of due process of law and satisfies the requirements set forth in the cases above. *We find that there is a natural and rational evidentiary relationship between the fact proved and the fact presumed and* . . . where a person has written an insufficient funds check and received property or other consideration therefore from the payee of the check and further where the maker of the check has been notified that the check has not been paid and fails to make payment within seven days after such notice, we find that *there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fradulent intent or guilty knowledge.*" *Haremza, supra* at 1223 (Emphasis added).

Accord *State* v. *Powell,* 220 Kan. 168, 551 P. 2d 902 (1976).

Numerous other jurisdictions and authorities have similarly held that the presumption contained in KRS 514.040(4)(b) bears a rational relationship to the fact proved. See *Stevens* v. *State,* (Fla.) 324 So. 2d 190 (1975), *State* v. *Campbell* (Idaho), 543 P. 2d 1171 (1975), *State* v. *Callahan,* (Conn.), 183 A. 2d 861 (1962), *State* v. *Morris,* (Kan.), 372 P. 2d 282 (1962), *Flannigan* v. *State,* (Md.), 191 A. 2d 591 (1963), *State* v. *Eggers,* (Neb.), 120 N. W. 2d 541 (1963). See also Torcia, *Wharton's Criminal Evidence,* §94 (13 ed. 1972) where it said:

> "By way of illustration, the constitutionality of the following presumptions has been sustained . . . . the issuance of a check drawn on a bank in which the drawer does not have sufficient funds to pay the check is prima facie evidence of his intent to defraud by means of a worthless check." *Torcia, supra.*

at 155, citing *Berry* v. *State,* 153 Ga. 169, 111 S. E. 669, 35 A.L.R. 370 (1922).

As can be seen from the foregoing authorities, appellant's contention that the presumption found in KRS 514.040 is arbitrary and irrational is completely without merit.

CONCLUSION

For the reasons stated in the respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of March, 1978, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing three (3) copies of the same in the United States mail, first-class postage prepaid, and addressed to Honorable Dale B. Mitchell, Mitchell & Gillum, P. O. Box 111, Somerset, Kentucky 42501, Counsel for Petitioner, and served the Commonwealth's Attorney by placing one (1) copy of same in the United States mail, first-class postage prepaid, and addressed to Honorable Harlan Veal, Commonwealth's Attorney, Main Street, Nicholasville, Kentucky 40356.

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